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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE F. JEWETT, JR. and LUCILLE M. JEWETT,

Petitioners,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF AN AMICUS CURIAE

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COMMISSIONER OF INTERNAL REVENUE,

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BRIEF OF AN AMICUS CURIAE

Statement of Interest and Rule 36.2 Compliance

This brief of an amicus curiae is being filed pursuant to Rule 36.2 of the Supreme Court Rules of Practice and Procedure on behalf of the Estate of Helen W. Halbach, John Poinier, Executor. The Halbach Estate is litigating with respondent the issue in this case. *See Estate of Halbach v. Commissioner,* 71 T.C. 141 (1978), and 40 T.C.M. 952 (1980). Copies of written consents to the filing of this brief, as required by that Rule, have been filed with the Office of the Clerk of the Supreme Court by both parties.

Summary of Argument

The 1933 decision of *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933), held that a disclaimer that was timely under State law did not constitute a taxable transfer for Federal transfer tax purposes. As shown by materials obtained under the Freedom of Information Act which are discussed below, respondent followed *Brown v. Routzahn* and attempted to codify it in 1958 in Treas. Reg. § 25.2511-1(c). If it was so codified, then George Jewett, Jr. should owe no tax, since his disclaimer was timely under State law. If *Brown v. Routzahn* was not so codified, the law thus being changed by the regulation, then respondent's application of that regulation (as now interpreted by respondent) to disclaimers of interests (such as that of George Jewett, Jr.) created before promulgation of the regulation is unfair, constitutes an abuse of respondent's discretion, and should be given no weight.

Case Law Background

In 1933, the United States Court of Appeals for the Sixth Circuit decided *Brown v. Routzahn*, 63 F.2d 914, *cert. denied*, 290 U.S. 641 (1933). The Sixth Circuit stated that there was no requirement under the relevant State law of Ohio that a disclaimer be made within any particular period of time to be valid, so long as it was made before actual distribution of the property. That Court then found that the disclaimer therein was valid under Ohio law, that the disclaimer simply constituted the exercise of a right to reject receipt of property rather than the transfer of property, and that the disclaimer therefore was not a "transfer" for Federal estate tax purposes.[1]

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1 The Federal estate and gift taxes are *in pari materia* and must be construed together, *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939), and the concept of "transfer" has been interpreted in the same manner under each tax. *See, e.g., Estate of Halbach v. Commissioner*, 71 T.C. 141 (1978).

Subsequent to *Brown v. Routzahn*, the Internal Revenue Service never publicly disagreed with that decision. No other decision bearing upon this issue arose from 1933 until 1952, when the Eighth Circuit decided *Hardenbergh v. Commissioner*, 198 F.2d 63, *cert. denied*, 344 U.S. 836 (1952). In *Hardenbergh*, the decedent died intestate and the Eighth Circuit found that the disclaimant's interest had vested under Minnesota law immediately upon the death of the decedent. The Eighth Circuit accordingly held that an effective disclaimer could not be made of such interest for Federal gift tax purposes because Minnesota law did not recognize as effective a disclaimer of an intestate interest which had immediately vested.

Hardenbergh thus left unchanged the rule of *Brown v. Routzahn* that a disclaimer which was effective under State law would be recognized for Federal transfer tax purposes, and indeed, *Hardenbergh* cited *Brown v. Routzahn* with approval with respect to disclaimers of testamentary gifts, carefully distinguishing *Brown v. Routzahn* on the basis of the testate-intestate State law difference. 198 F.2d 66.

Thus, prior to 1958 nothing in Federal transfer tax law would cause a holder of a remainder interest created by will to disclaim immediately upon creation of the interest, nor does there appear to have been any such impetus under State law. Against this historical background, the final version of Treas. Reg. § 25.2511-1(c) was published in 1958.

The 1978 Freedom of Information Act Request

On June 13, 1978, the United States Tax Court stated in this case (70 T.C. 430, 432-433) that "[t]he answer to [the question at issue] is to be found in the proper interpretation of section 25.2511-1(c), Gift Tax Regs. . . ." The Tax Court noted in footnote 4, at 70 T.C. 436, that "[p]etitioner also relies upon *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), certiorari denied, 290 U.S. 641. That case interpreted provisions of the Revenue Act of 1921, and did not purport to consider the effect of the

regulations which control the disposition of this case." In view of this language, on July 21, 1978 the undersigned filed a request with respondent under the Freedom of Information Act (5 U.S.C. § 552) for:

> 1. The file of the Legislation and Regulations Division, Office of the Chief Counsel, I.R.S., underlying preparation of Treasury Decision (T.D.) 6334 (filed November 14, 1958) (which contained Treas. Reg. § 25.2511-1(c)), sometimes called the 'T.D. file.'
>
> 2. The technical memorandum, if any, accompanying T.D. 6334 from the Internal Revenue Service to the Treasury Department.
>
> 3. Any other materials underlying preparation or interpretation of T.D. 6334 not contained in the file described above in paragraph 1.

Quick disposition of this request was expected in light of the duty of respondent to dispose of the request within 10 working days and of any administrative appeal within 20 working days, see 5 U.S.C. § 552(a)(6)(A), and in light of the burden upon respondent to sustain any decision not to make all requested records available. *See* Treas. Reg. § 601.702(c)(ii); *Mead Data Central, Inc. v. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Conway v. I.R.S.*, 447 F. Supp. 1128, 1134 (D.D.C. 1978).

Before respondent did respond to the Freedom of Information Act request, however, the Tax Court filed its opinion in *Estate of Halbach v. Commissioner*, 71 T.C. 141, on November 9, 1978. The Tax Court held that the disclaimer at issue therein constituted a "transfer" for Federal estate tax purposes under Section 2035[2] and stated:

> Petitioner also contends that respondent's application of the reasonableness test of section 25.2511-1(c), Gift

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2 Statutory references are to the Internal Revenue Code of 1954, unless otherwise indicated.

> Tax Regs., is an abuse of the Commissioner's discretion. We think he confuses the retroactive application of a case interpreting that section with the retroactive application of the regulation itself. *Jewett v. Commissioner, supra,* is an interpretation of that regulation as applied to a 1972 disclaimer of an irrevocable interest created in 1939. Herein we are considering the effect of a 1970 disclaimer of an interest created in 1937. While we are not relying on this gift tax regulation as dispositive of the estate tax question before us, we do not agree with petitioner that the regulation's interpretation of a section 2511 transfer should be disregarded in our determination of whether a section 2035 transfer existed. In any event, petitioner can hardly contend he lacked notice with respect to a regulation adopted in 1958, T.D. 6334, 1958-2 C.B. 628.

The opinion cited footnote 4 of the Tax Court's opinion in *Jewett* in dismissing *Brown v. Routzahn* because "that case * * * did not have to consider sec. 25.2511-1(c), Gift Tax Regs." (71 T.C. 146).

Respondent did not dispose of the Freedom of Information Act request for over one year after it was filed, as respondent's representatives needed repeated extensions of time on the grounds that the various records requested had not yet been located or, later on, that they had not yet been prepared for disclosure. Appendix 1 is a copy of respondent's response on July 25, 1979. Even then, most of the materials requested were withheld, and nothing of substantive importance was contained in the materials that were released.

On August 13, 1979, an appeal of respondent's refusal to release all documents requested was filed. Respondent denied that appeal entirely on November 19, 1979. See App. 2. The undersigned accordingly filed a Complaint against respondent under the Freedom of Information Act in the United States District Court for the District of Columbia on February 20, 1980. See App. 3.

In response to that Complaint, the Department of Justice released the remainder of the documents requested on May 9, 1980, except for three General Counsel Memoranda (G.C.M.s) and the Technical Memorandum for T.D. 6334. See App. 4. The Department of Justice then stipulated that it would release those documents if the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's decision in *Taxation With Representation Fund v. Internal Revenue Service*, 485 F. Supp. 263 (D.D.C. 1980), in which respondent was ordered to disclose all G.C.M.s and T.M.s issued after July 4, 1967. The District of Columbia Circuit did affirm the District Court's decision in all material aspects, ____ F.2d ____, 47 A.F.T.R. 2d 81-1026, 81-1 U.S.T.C. 86,580 (Mar. 12, 1981), and the Technical Memorandum and two of the three G.C.M.s were just released on June 15, 1981. See App. 5. The last G.C.M. being withheld was written in 1964, according to the Department of Justice. The undersigned are continuing efforts to secure release of that G.C.M., which is still being withheld almost three years after the Freedom of Information Act request was filed.

Contents of T.D. File Documents Released

The documents released by the Department of Justice show, as will be discussed below, that respondent intended to codify *Brown v. Routzahn* in Treas. Reg. § 25.2511-1(c). These materials provide compelling grounds for discounting entirely the interpretation of Treas. Reg. § 25.2511-1(c) which respondent now urges and for holding that application of such regulation to disclaimers of interests created before 1958 constitutes an abuse of respondent's discretion under Section 7805(b).[3]

Turning now to the specific materials obtained from the T.D. file, Appendix 6 is a transmittal memorandum dated May 25, 1956 for a proposed revenue ruling to be published prior to the

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3 Section 7805(b), which allows respondent to make regulations prospective only in effect, will be discussed more fully below.

regulation in issue. Since the ruling involved Section 7805(b), the Commissioner had to approve it for publication personally, and the memorandum states that it accordingly had to be cleared with the Technical Planning Division before it could be resubmitted to the Commissioner for approval.

The proposed ruling (App. 7) holds that a renunciation of an inheritance or legacy under a will constitutes a taxable "transfer" for gift tax purposes, regardless of property law title considerations. No reasonable time standard is articulated by the ruling. The ruling states, however, as follows (App. p. 15a):

> [U]nder the authority contained in Section 7805(b) of the Internal Revenue Code of 1954, the ruling set forth herein will not be applied retroactively with respect to such renunciation which became absolute and irrevocable prior to _____, the date of this Bulletin.

The use of Section 7805(b) in this ruling evidences an awareness that the ruling would change existing law. More importantly, the use of Section 7805(b) evidences an awareness that it would be an abuse of discretion to apply this interpretation to previous disclaimers. The undersigned submit that an equitable application of Section 7805(b) to this ruling would require that a disclaimer of any interest created before publication of the ruling be exempted from application of the ruling, or at least be made within a specified time after its publication, since otherwise holders of prior interests would be deprived of the opportunity previously available to others to disclaim without incurring a tax (in the Service's view). Congress took such an approach in the Tax Reform Act of 1976 by subjecting to Section 2518 only disclaimers of interests created after 1976; a post-1976 disclaimer of a pre-1977 interest is not subject to the change in law effected by Section 2518. *See* Section 2009(e), P.L. 94-455, 90 Stat. 1520. In any event, the ruling establishes that respondent thought it necessary to provide relief under Section 7805(b) with respect to this very issue in the course of preparation of the regulation in issue.

As shown by Appendix 8, the proposed ruling was inconsistent with a regulation being drafted under the 1954 Internal Revenue Code. Accordingly, a tightly-written memorandum was drafted which recommended withholding publication of the ruling pending promulgation of the final gift tax regulations (App. 9):

* * *

> In the past the Service has followed the decisions of the courts in the cases of *Brown v. Routzahn*, 63 F.2d 914, and *Hardenbergh v. Commissioner*, 198 F.2d 63, in determining whether the renunciation of a gift, bequest, or inheritance constitutes the making of a gift. Pursuant to *Brown v. Routzahn*, the Service has taken the position that if the decedent's death did not automatically vest title in the beneficiary, a timely renunciation of the bequest would not constitute the making of a gift. However, pursuant to the *Hardenbergh* case, the Service took the position that if title vested immediately, then the beneficiary by renouncing the bequest gave up something legally owned by him and thereby made a gift. The distinction between the cases is whether title *vested* in the beneficiary. The proposed revenue ruling would, among other things, abolish the distinction and hold that a renunciation under the circumstances present in the *Brown v. Routzahn* case (where the renunciation became effective before legal title vested in the beneficiary) constitutes the making of a gift.
>
> At the time the gift tax regulations under the 1954 Code were being developed, consideration was given to the inclusion in the regulations of the rules in *Brown v. Routzahn* and *Hardenbergh v. Commissioner*. The proposed published ruling was reviewed by this Division and by the Legal Advisory Staff in connection with the consideration given to this matter. All persons concerned believed that the distinction drawn by these court decisions was artificial, and that renunciations under both sets of circumstances should be treated in the same manner. However, several persons felt that a reversal at this time

of the Service's prior position might result in legislation excluding from gift tax renunciations under both sets of circumstances, and, therefore, that the prior position of the Service with respect to cases coming within the *Brown v. Routzahn* decision should not be changed. Mr. Laurens Williams, at that time Assistant to the Secretary (and Head, Legal Advisory Staff) inclined to this view. As a result language has been inserted in the proposed gift tax regulations adopting the rules in these two court decisions. The language in the proposed regulations (section 25.2511-1(c)) on the subject reads as follows:

> " * * * The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does [not] immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest. * * * "

This memorandum establishes that respondent followed *Brown v. Routzahn* before 1958 and that respondent intended to codify that case in the regulation. *Cf.* Prop. Treas. Reg. § 25.2511-1(c), published in the Federal Register on January 3, 1957. This memorandum was written sometime between May 25, 1956 (App. 6) and October 11, 1957, when the final version of the memorandum (which omitted most of the substantive comments contained above) was typed (App. 10).

Sometime after the final memorandum draft was initialled on December 16, 1957 (App. 10) and before promulgation of the final regulation on November 14, 1958, Mr. Paul Schmid, apparently of the Legislation and Regulations Division of the Office of Chief Counsel, I.R.S. (App. 11, p. 24a), listed a number of changes to be made in the final gift tax regulations draft, including the following: "On page 32, paragraph (c) the

renunciation rule should not depend on testacy v. intestacy." (App. 11).

Also during that period, respondent's final analysis of the disclaimer regulation was set forth in the Technical Memorandum for the regulation, dated October 1, 1958. The Technical Memorandum is the official Internal Revenue Service explanation to the Treasury Department concerning the regulation and as such is a form of legislative history for the regulation. *See Taxation With Representation Fund v. Commissioner,* ____ F.2d ____, 47 A.F.T.R. 2d 81-1026, 81-1 U.S.T.C. 86,580 (D.C. Cir. Mar. 12, 1981). The Technical Memorandum (App. 12) stated in relevant part as follows:

> MEMORANDUM FOR: Honorable Robert B. Anderson
> Secretary of the Treasury
>
> SUBJECT: Proposed Treasury decision — Regulations under provisions of the Internal Revenue Code of 1954 relating to the gift tax.
>
> There is transmitted herewith, with the recommendation that it be approved, a proposed Treasury decision which would issue the Gift Tax Regulations (26 CFR Part 25) under chapter 12 of subtitle B of the Internal Revenue Code of 1954. * * *
>
> * * *
>
> * * * A few significant changes were made in the portions of the proposed regulations which pertain to subjects peculiar to the gift tax. These changes may be summarized as follows:
>
> *Disclaimers.*
>
> Paragraph (c) of section 25.2511-1, as set forth in the notice, discussed certain acts which constitute the making of a gift. Among the acts discussed is the renunciation, or attempted renunciation, of property, or a property interest, passing from a decedent. In what was intended to be the application of the rules in *Brown v. Routzahn* (1933) 63 F.2d 914, cert. denied 290 U.S. 641, and *Har-*

denbergh v. Commissioner (1952) 198 F.2d 63, cert. denied 344 U.S. 836, it was stated that where title to the property did not vest in the beneficiary or heir immediately upon the decedent's death, the renunciation of the property did not constitute the making of a gift, but that where title vested in the beneficiary or heir immediately upon the decendent's death, the act of the beneficiary or heir in giving up what passed to him from the decedent constituted the making of a gift. Furthermore, in the notice the position was taken in paragraph (c) that a partial renunciation of property could not be made. Protests on these provisions were received. After reviewing these protests, we have reconsidered our position and now believe that the proper distinction between these two court cases turns on the question of whether under the applicable State law a beneficiary or heir can or cannot refuse to accept ownership of the property which passed from the decedent. Accordingly, we have revised paragraph (c) of section 25.2511-1 to reflect this change of position. Also, we have abandoned the position that a partial renunciation cannot be made, and paragraph (c) has been further changed to recognize a partial renunciation where it is effective, as such, under local law.

* * *

[s] Commissioner
[of Internal Revenue]

The Technical Memorandum thus also establishes that respondent intended to codify *Brown v. Routzahn* in the regulation and, in fact, thought the final regulation represented a more accurate codification than the proposed regulation. No other proposed regulations were issued before the final regulation was promulgated (see T.D. 6334, 1958-2 C.B. 627).

No other material released under the Freedom of Information Act illuminates the reasoning underlying adoption of the language contained in Treas. Reg. § 25.2511-1(c) (the "protests" mentioned in the Technical Memorandum have been requested from the Department of Justice, and respondent is now searching for them).

Conclusions of Fact

A number of critical considerations emanate from these materials. First, a holder of an interest during the period from 1933 (when *Brown v. Routzahn* was decided) through 1957 could reasonably and correctly have believed that a disclaimer of such interest which was permitted under State law would not incur a Federal estate or gift tax. It was reasonable for taxpayers to have relied on *Brown v. Routzahn* and to have structured their affairs accordingly.

Second, respondent considered at length whether to follow *Brown v. Routzahn* during the course of preparation of the regulation, and a policy decision was made to follow *Brown v. Routzahn* in the regulation. The memorandum reproduced in Appendix 9 stated that several persons, including Mr. Laurens Williams (Assistant to the Secretary of the Treasury and Head of the Legal Advisory Staff), thought that respondent should continue to follow *Brown v. Routzahn* and *Hardenbergh v. Commissioner* and that "*[a]s a result* language has been inserted in the proposed gift tax regulations *adopting the rules in these two court decisions.*" (emphasis added) Similarly, the Technical Memorandum states that the proposed regulation was "intended to be the application of the rules in *Brown* * * * and *Hardenbergh* * * * " and that the final regulation was revised to reflect respondent's change in position that the proper distinction to be made in applying such rules was whether a disclaimer could be made "under the applicable State law", rather than whether title to the property had vested before the disclaimer was made.

Finally, respondent realized during preparation of Treas. Reg. § 25.2511-1(c) that a reversal of his position in the disclaimer area was a suitable occasion for the exercise of discretion under Section 7805(b), as evidenced by the invoking of such relief by the proposed revenue ruling.

Argument

A Technical Memorandum is a form of legislative history with respect to a Treasury regulation. *See Taxation With Representation Fund v. Commissioner,* ____ F.2d ____, 47 A.F.T.R. 2d 81-1026, 81-1030, 81-1038, 81-1040, 81-1 U.S.T.C. 86,580, 86,584, 86,592, 86,596 (D.C. Cir. Mar. 12, 1981). Since legislative history is used as an aid to interpret ambiguous legislation, the undersigned submit that a Technical Memorandum rightfully may be used to interpret an ambiguous Treasury regulation. Indeed, a Technical Memorandum "may tell more about a regulation than the regulation itself." *Taxation With Representation Fund v. Commissioner, supra* at 47 A.F.T.R. 2d 81-1029, 81-1040, 81-1 U.S.T.C. 86,584, 86,594.

The final version of Treas. Reg. § 25.2511-1(c) was ambiguous due to use of the phrase "reasonable time after knowledge of the existence of the *transfer.*" (emphasis added) Since *Brown v. Routzahn* turned on the Ohio law question of whether the disclaimer was made at any time before the property was actually distributed to the disclaimant, and since State law generally permitted disclaimers of remainder interests to be made immediately after the death of the life beneficiary, the public was justified in believing that the term "transfer" required an actual vesting of the right to possession of property in the remainder interest context. By contrast, respondent now interprets "transfer" to mean the transfer of property in trust following a decedent's death. Respondent's ambiguous statement of the reasonable time standard in the final regulation avoided the potential Congressional reversal (and possible public objections) feared by respondent's representatives (see App. 9) and has afforded respondent room to assert that *Brown v. Routzahn* has been displaced by the regulation, notwithstanding the intent of the drafters of the regulation. Had the regulation's standard been clearly stated, however, taxpayers undoubtedly would have re-evaluated both the entire area of disclaimers and any particular disclaimers that they had already contemplated making when the regulation was pro-

mulgated. The regulation is ambiguous, and thus, the Technical Memorandum is a legitimate source of interpretation in this case.

The Technical Memorandum and the other materials discussed above show that respondent attempted to follow *Brown v. Routzahn* in Treas. Reg. § 25.2511-1(c). That attempt erred, however, because the "reasonable time after knowledge of the existence of the transfer" test, as now interpreted by respondent, is inconsistent with the letter and spirit of *Brown v. Routzahn:* first, because the disclaimer in *Brown v. Routzahn* came seven years after the disclaimant had knowledge of the interest, and second, because the thrust of *Brown v. Routzahn* was that a disclaimer that was valid under State law did not constitute a transfer for Federal transfer tax purposes. Since post-1958 disclaimers made under State law might or might not be made within a "reasonable time after knowledge of the existence of the transfer," the regulation as now applied by respondent does not accurately follow *Brown v. Routzahn.*

It appears that the drafters of the regulation did not consider such a potential inconsistency. Their lack of focus on the critical "reasonable time after knowledge of the existence of the transfer" test is reflected by the complete lack of discussion of such test in any of the materials discussed above. Further, the drafters' stated belief that they were codifying *Brown v. Routzahn* explains why they gave no thought to giving prospective relief under Section 7805(b) to holders of pre-1958 interests: since the regulation represented to the drafters no apparent change in position from *Brown v. Routzahn,* no need for such relief existed.

The position of respondent now, however, is that the regulation added a Federal reasonable time test for disclaimers. If this position is correct, then respondent's failure to afford relief to holders of prior interests following his change in position is indefensible.

Respondent's position is accordingly untenable in either event. If *Brown v. Routzahn* is codified in the regulation, then

George Jewett, Jr. and similarly-situated taxpayers should owe no tax. If *Brown v. Routzahn* is not codified, then George Jewett, Jr. and similarly-situated taxpayers should have been afforded a grace period following adoption of the regulation in which to disclaim, or the regulation should have been made applicable only to disclaimers of interests created after 1958. In other words, application of this regulation to George Jewett, Jr. and similarly-situated taxpayers is unreasonable and unfair.

Assuming that this Court finds that *Brown v. Routzahn* was not accurately codified in the regulation, respondent's failure to apply that regulation with only prospective effect constituted an abuse of respondent's discretion under Section 7805(b). That Section states that "[t]he Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive *effect*." (emphasis added) Although the language of the statute, as well as its legislative history,[4] might suggest that Section 7805(b) was simply intended to afford respondent the opportunity to grant discretionary relief to taxpayers, the courts have subsequently imposed a duty upon respondent not to abuse this discretion. *See, e.g., Automobile Club of Mich. v. Commissioner,* 353 U.S. 180, 184 (1957). Thus, as the Court of Claims stated in *International Business Machines Corp. v. United States,* 343 F.2d 914 (Ct. Cl. 1965), *cert. denied,* 382 U.S. 1028 (1966),

> Implicit, too, in the Congressional award of discretion to the Service, through Section 7805(b), is the power as well as the obligation to consider the totality of the circumstances surrounding the handing down of a ruling * * * This factor has come to be recognized as central to the administration of the section. * * *
>
> * * * [Also] inherent to Section 7805(b) is that the Commissioner's exercise of discretion is reviewable (in a

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4 H.R. Rep. No. 350, 67th Cong., 1st Sess. 15 (1921); S. Rep. No. 275, 67th Cong., 1st Sess. 32 (1921); H.R. Rep. No. 1882, 70th Cong., 1st Sess. 22 (Amendment 185) (1928); H.R. Rep. No. 704, 73rd Cong., 2d Sess. 38 (1934).

> proper proceeding) for abuse, in the same way as other discretionary administrative determinations. The Internal Revenue Service does not have *carte blanche*. Its choice must be a rational one, supported by relevant considerations.

In sum, as this Court stated in *Automobile Club of Mich. v. Commissioner*, 353 U.S. 180, 184 (1957), "it is clear from the language of the section and its legislative history that Congress thereby confirmed the authority of the Commissioner to correct any ruling, regulation, or Treasury decision retroactively, but empowered him, in his discretion, to limit retroactive application *to the extent necessary to avoid inequitable results.*" (emphasis added; fn.ref. omitted)

The undersigned respectfully submit that the injustice done by respondent in failing to exercise his discretion with respect to these taxpayers cries out to this Court for correction as an abuse of discretion. *Cf. Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 981 (5th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978). The fact that respondent apparently did not appreciate that the regulation changed the law certainly does not excuse respondent's failure to avoid arbitrarily depriving holders of prior interests of the right to disclaim free of tax. The significance of such deprivation is put in perspective when one realizes that it is the exercise of the right to disclaim that respondent seeks to tax. Furthermore, respondent even realized during the course of preparation of the regulation that relief was appropriate in this area under Section 7805(b).

In the alternative, entirely apart from Section 7805(b), it is clear that Treas. Reg. § 25.2511-1(c) is merely an "interpretative" regulation, to be relied upon only as follows (*Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)):

> The weight of such [informed administrative interpretative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pro-

nouncements, and all those factors which give it power to persuade, if lacking power to control.

Accord, Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979); *Batterton v. Francis,* 432 U.S. 416, 425 (n.9) (1977); *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-145 (1976); *Morton v. Ruiz,* 415 U.S. 199, 237 (1974); *Daughters of Miriam Ctr. for the Aged v. Mathews,* 590 F.2d 1250, 1258, 1263 (3d Cir. 1978). These cases make clear that the taking of an inconsistent position by an administrative agency severely undercuts the weight to be given to an interpretative regulation; indeed, inconsistency appears to be the primary factor to be weighed in this regard. Respondent was obviously inconsistent in Treas. Reg. § 25.2511-1(c) with his prior position of following *Brown v. Routzahn.* Moreover, that regulation was inept in its attempt to codify *Brown v. Routzahn,* as the litigation which has resulted demonstrates. Thus, although Treasury regulations generally are given consideration and weight by the courts, *see, e.g., Quaker City Iron Works, Inc. v. United States,* 256 F. Supp. 450, 453 (E.D. Pa. 1966), in view of the rather unusual circumstances underlying Treas. Reg. § 25.2511-1(c), that regulation is entitled to no weight.

Furthermore, it is insufficient to say that the regulation applies only to disclaimers made after 1958, rather than disclaimers of interests created after 1958, since under respondent's present interpretation of the regulation holders of pre-1958 interests were unfairly and unjustifiably prevented from ever disclaiming without incurring a gift tax following promulgation of the regulation. Congress recognized this very distinction when it made Section 2518 applicable only to disclaimers of interests created after 1976; that Section is inapplicable to disclaimers made after 1976 of interests created before 1977. *See* Section 2009(e) of the Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1520. Only the approach taken by Congress effects a change in disclaimer tax law without adversely affecting prior transactions undertaken in reliance upon then-existing law. *Cf. United States v. Byrum,* 408 U.S. 125, 134-135 (1972).

Finally, respondent has no right to complain that the materials discussed herein have not been raised at the Tax Court or Ninth Circuit levels, as the delay in their being raised was caused by respondent. Surely respondent cannot take advantage of his own acts in such manner.[5] The undersigned described such materials (except the Technical Memorandum, which had not yet been released) in a Motion for Leave to File Brief Amicus Curiae filed with the Ninth Circuit in connection with Petitioners' Petition for Rehearing, but both such requests were denied. Also, the undersigned annexed copies of such materials (except the Technical Memorandum, which again had not yet been released) to a Motion for Reconsideration filed with the Tax Court in *Estate of Halbach v. Commissioner* on September 4, 1980, but that motion was also denied.

In any event, the proper standard to be applied to disclaimants of pre-1958 interests should be the *Brown v. Routzahn* standard of whether they were permissible under State law. If this Court should disagree, the undersigned submit that Treas. Reg. § 25.2511-1(c) was properly interpreted by *Keinath v. Commissioner,* 480 F.2d 57 (8th Cir. 1973), and *Cottrell v. Commissioner,* 628 F.2d 1127 (8th Cir. 1980). The undersigned also wish to express their support for the very well stated arguments contained in Petitioners' Petition for Writ of Certiorari and Petitioners' Brief.

Conclusion

The drafters of Treas. Reg. § 25.2511-1(c) intended to codify *Brown v. Routzahn.* Their intent can be effectuated by reading "transfer" to mean vesting of the right to possession in the remainder interest context.

---

5 The Freedom of Information Act request was made on July 21, 1978. The Tax Court entered decision in this case on August 17, 1978. A Motion to Vacate the Tax Court's decision could have been filed for at least 90 days thereafter, long after respondent should have released these documents. *See* Rule 162, Tax Court Rules of Practice and Procedure; 5 U.S.C. § 552(a)(6)(A), discussed at p. 4 herein; and cases cited in Par. 5-6 [2] by Freeman and Freeman, *The Tax Practice Deskbook* 5-61 (1973).

In the alternative, respondent unilaterally changed the rules in the middle of the game for holders of interests created before 1958, contrary to any reasonable notion of equity or justice. The application of respondent's interpretation of Treas. Reg. § 25.2511-1(c) to disclaimers of pre-1958 interests is unfair and constitutes an abuse of respondent's discretion under Section 7805(b).

Finally, in light of the rather unusual background of Treas. Reg. § 25.2511-1(c) discussed herein, that regulation simply does not deserve the interpretative weight given to it by the opinions of the Tax Court and the Ninth Circuit. The dismissal of *Brown v. Routzahn* in those opinions (explicitly by the Tax Court and implicitly by the Ninth Circuit) as having been superseded by Treas. Reg. § 25.2511-1(c) certainly merits re-examination; to allow respondent to overrule *Brown v. Routzahn* in this manner would legitimatize and condone evisceration of a judicial decision with which at least some representatives of respondent did not agree.

Respectfully submitted,

/s/ COLEMAN BURKE
Coleman Burke

/s/ WALLACE B. LIVERANCE, JR.
Wallace B. Liverance, Jr.

/s/ GEOFFREY J. O'CONNOR
Geoffrey J. O'Connor

529 Fifth Avenue
New York, New York 10017
Tel.: (212) 661-6600

Dated: July 9, 1981

APPENDICES

APPENDIX 1

Washington, DC 20224

Person to Contact:
Mr. L. Kirschner
Telephone Number:
(202) 566-4912
Refer Reply to:
TX:D:F:2 78-570
Date: Jul 25 1979

Mr. Geoffrey J. O'Connor
Burke & Burke
30 Rockefeller Plaza
New York, NY 20020

Dear Mr. O'Connor:

This is in further response to your July 21, 1978, Freedom of Information Act request for documents underlying the issuance of Treasury Decision 6334.

We are pleased to enclose selected materials from the files which you requested. We regret that we cannot provide you with the remainder of materials underlying the preparation of T.D. 6334. The materials are considered to be subject to the attorney-client and governmental privileges and are exempt from the disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 by subsection (b)(5). We have also excised a portion of one of the documents and deleted its enclosures. This information is denied as it is considered to be exempt from the disclosure requirements in accordance with 5 U.S.C. 552(b)(3) since it constitutes return information which is specifically exempted by statute (26 U.S.C. 6103).

The enclosed Notice 393 describes the above cited exemptions and sets out the appeal procedures.

Sincerely yours,

(Signature Illegible)
Chief
Freedom of Information
Branch

Enclosures
Notice 393
Selected Documents regarding T.D. 6334

APPENDIX 2

DEPUTY COMMISSIONER OF INTERNAL REVENUE

Washington, DC 20224

Nov. 19, 1979

Mr. Geoffrey J. O'Connor
Burke & Burke
30 Rockefeller Plaza
New York, NY 10020

Dear Mr. O'Connor:

This is in response to your appeal filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, regarding materials relating to preparation of T.D. 6334, 1958-2 C.B. 627. You are not entitled to additional information on appeal. This decision is based upon subsections (b)(2), (b)(3) and (b)(5) of the FOIA.

Subsection (b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This subsection has been construed to exempt those documents normally privileged in the civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The FOIA legislative history reflects that such was the purpose of this exemption. S. Rep. No. 813, 39th Cong., 1st Sess. 2 (1965). The Government's executive privilege and the attorney-client privilege are subsumed by exemption (b)(5). *Sears*, 421 U.S. at 150, 154.

The documents denied pursuant to subsection (b)(5) consist largely of drafts of proposed regulations and revenue rulings. The denied material relates to predecisional advice rendered by Service personnel. It was prepared as a medium for internal debate and discussion in order to improve the quality of the

final published version of the ruling or regulation. This is precisely the type of predecisional advisory material which exemption (b)(5) was designed to protect. Disclosure would have a chilling effect on the Service's decision making process.

The documents at issue do not contain segregable facts. It has been determined that factual information contained in documents is not subject to disclosure when it is so inextricably intertwined with the policymaking process that the very choice of facts reveals the concerns of the agency and the deliberations of staff personnel. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 66-68 (D.C. Cir. 1979); *Koch v. Department of Justice*, 376 F. Supp. 313, 317 (D.D.C. 1974).

To the extent that we have General Counsel Memorandums (GCMs) interpreting T.D. 6334, these documents would also be protected by exemption (b)(5). The Service is presently involved in litigation concerning the availability of GCMs pursuant to the FOIA. *Taxation With Representation Fund v. Internal Revenue Service*, No. 78-2304 (D.D.C., filed December 8, 1978).

Subsection (b)(2) exempts from disclosure records which "are related solely to the internal personnel rules and practices of an agency." Courts have interpreted this subsection to exempt various routing information. Several of the documents denied consist of internal routing and transmittal forms properly exempt from disclosure by subsection (b)(2).

Various documents contain third party taxpayer identifying information. Such information constitutes return information as defined in I.R.C. section 6103(b)(2) and is specifically exempt from disclosure to you by subsection (b)(3) in conjunction with section 6103(a).

The function of the Internal Revenue Service is to administer the Internal Revenue Code. It is the Service's duty to determine the reasonable meaning of various Code provisions in light of the congressional purpose in enacting them. In addition to Treasury decisions, the Service publishes all substantive reve-

nue rulings in order to provide a uniform application of the tax laws. Furthermore, the text of any written determination and related background file document is open to public inspection pursuant to I.R.C. section 6110. Any request for § 6110 material should be submitted to the National Office Reading Room.

Under the provisions of the FOIA, you are entitled to a judicial review of this decision. A complaint may be filed in the United States District Court in the district in which you reside, or have your principal place of business, or in the District of Columbia, the location of the requested records.

Very truly yours,

WILLIAM E. WILLIAMS

APPENDIX 3

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

GEOFFREY J. O'CONNOR, 20 Hilltop Road, Port Washington, New York 11050, Tel.: (516) 883-0133,

Plaintiff,

—against—

INTERNAL REVENUE SERVICE, 1111 Constitution Avenue, N.W., Washington, D.C. 20217, Tel.: (202) 566-4441,

Defendant.

COMPLAINT

Plaintiff, Geoffrey J. O'Connor, by his undersigned attorneys, as and for his complaint herein, alleges:

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522, as amended, to order the production of agency records improperly withheld from plaintiff.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552 (a)(4)(B).

3. Plaintiff, Geoffrey J. O'Connor, is a citizen and a resident of the State of New York, residing at 20 Hilltop Road, Port Washington, New York.

4. Defendant, Internal Revenue Service, is an agency of the United States and has possession of the records to which plaintiff seeks access.

5. On November 14, 1958, the Treasury Department promulgated Treasury Decision (T.D.) 6334.

6. On or about July 21, 1978, plaintiff made a written request to defendant pursuant to 5 U.S.C. § 552 and the regulations thereunder, including Treas. Reg. § 601.701 *et seq.*, for copies of the following: (a) the file of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service underlying preparation of T.D. 6334; (b) the technical memorandum, if any, accompanying T.D. 6334 from the Internal Revenue Service to the Treasury Department; and (c) any other materials underlying preparation or interpretation of T.D. 6334. A copy of said letter is annexed hereto as Exhibit "A".

7. Under letter dated July 25, 1979, defendant provided plaintiff with copies of a limited number of materials selected by defendant from the files and documents requested by plaintiff. All other documents which fell within plaintiff's request were withheld on the purported ground that they were subject to "attorney-client and governmental privileges" and therefore exempt from disclosure pursuant to 5 U.S.C. § 522(b)(5). A copy of said letter is annexed hereto as Exhibit "B".

8. By letter dated August 13, 1979, plaintiff duly filed a written appeal, pursuant to the provisions of Treasury Regulations § 601.702(c)(8), from that portion of defendant's decision dated July 25, 1979 which refused to produce those documents purportedly exempt from disclosure under 5 U.S.C. § 522(b)(5) on the grounds of "attorney-client and governmental privilege". A copy of said letter is annexed hereto as Exhibit "C".

9. Thereafter, by letter dated November 19, 1979, defendant affirmed its earlier decision and rejected plaintiff's appeal. A copy of said letter is annexed hereto as Exhibit "D".

10. Plaintiff is informed and believes that such claim of privilege is unjustified, in whole or in part.

11. Plaintiff is entitled to access to the documents withheld by defendant, and the denial of such access by defendant is without legal basis.

WHEREFORE, plaintiff prays that this Court enter judgment in his favor and against defendant: (1) ordering the defendant to make the documents withheld available as requested; (2) awarding plaintiff his costs and disbursements, including reasonable attorneys' fees, incurred in this action; and (3) granting such other, further and different relief as the Court may deem just and proper.

Dated: Washington, D.C.
February , 1980

KELLY AND NICOLAIDES

By _____
A Member of the Firm
Attorneys for Plaintiff
1511 K Street, N.W.
Washington, D.C. 20005
Tel.: (212) 628-0514

—and—

BURKE & BURKE
Attorneys for Plaintiff
30 Rockefeller Plaza
New York, New York 10020
Tel.: (212) 489-0400

APPENDIX 4

[SEAL]

U.S. Department of Justice
Washington, D.C. 20530

MCF:JJMcC:PAScott:pvv
5-16-1219
CMN: 8012916

May 9, 1980

Geoffrey J. O'Conner, Esquire
Burke & Burke
529 5th Avenue
New York, New York 10017

Re: Geoffrey J. O'Connor v. Internal Revenue Service, Civil No. 80-0495 (USDC D.C.)

Dear Mr. O'Conner:

Enclosed are all but four of the documents at issue. It should be noted that by release of these documents, the Government does not admit that they were wrongfully withheld.

Sincerely yours,

M. CARR FERGUSON
Assistant Attorney General
Tax Division

By: JOHN J. McCARTHY
JOHN J. McCARTHY
Chief, Civil Trial Section
Central Region

Enclosures

APPENDIX 5

U.S. Department of Justice

Tax Division

[SEAL]

Washington, D.C. 20530

JFM:EJS:PAScott:pvv
5-16-1219
CMN: 8012916

June 15, 1981

EXPRESS MAIL

Geoffrey J. O'Conner, Esquire
Burke & Burke
529 Fifth Street
New York, New York 10017

Re: Geoffrey J. O'Connor v. Internal Revenue Service, Civil Action No. 80-0495 (USDC D.C.)

Dear Mr. O'Conner:

Enclosed for your retention are two General Counsel Memoranda (GCM's) and one Technical Memoranda (TM). Deletions have been made for all third-party return information. There is one GCM which is not being released. This GCM relates to a private letter ruling. The decision in *Taxation With Representation Fund* v. *Internal Revenue Service,* 81-1 U.S.T.C., par. 9252 (D D.C., 1981) does not require the release of third-party information and it is our opinion that the withheld GCM contains third-party return information.

Sincerely yours,

JOHN F. MURRAY
Acting Assistant
Attorney General
Tax Division

By: EDWARD J. SNYDER
EDWARD J. SNYDER
Acting Chief
Civil Trial Section,
Central Region

Enclosures

APPENDIX 6

	NAME	SYMBOLS	ROOM	INITIALS
1.	Technical Planning Division (Attention: Mr. Littleton)	T:P	4050	DATE
2.				DATE
3.	CM-952 RECEIVED			DATE
4.	MAY 28 [illegible]			DATE
5.	TECHNICAL PLANNING DIVISION			DATE

FOR:

- ☐ Approval
- ☐ As requested
- ☐ Call me
- ☐ Correction
- ☐ Filing
- ☐ Full report
- ☐ Handle directly
- ☐ Immediate action
- ☐ Initials
- ☐ Necessary action
- ☐ Note and return
- ☐ Recommendation
- ☐ See me
- ☐ Signature
- ☐ Your comment
- ☐ Your information
- ☐ _____
- ☐ _____
- ☐ Prepare reply for signature of _____

Answer or acknowledge before _____

REMARKS (Control File No. M-311
Proposed Revenue Ruling
Re: Director of Internal Revenue
[redacted]

The attached file contains a ruling under the 1954 Code which is proposed for publication in advance of the regulations. Since it involves section 7805(b) of the Code it requires the Commissioner's approval for publication. It was inadvertently forwarded for the Commissioner's signature before submitting it to your office in accordance with established procedures for clearance with the Treasury Dept. Your consideration of the file is now requested. An early reply will be appreciated.

FROM	DATE
H. P. Kraack Chief, Bulletin Branch	5/25/56

(Use reverse side if necessary)

APPENDIX 7

PART I

SECTION 2501.—IMPOSITION OF TAX

Rev. Rul.

> A renunciation, release or relinquishment by a legatee or devisee under a will or by a beneficiary under a policy of insurance constitutes a transfer of property or property rights or interests subject to Federal gift tax under Chaper 12 of the Internal Revenue Code of 1954.

The Internal Revenue Service has recently received inquiries concerning the effect, for gift tax purposes, of State or local law respecting title to the property in cases of renunciations, releases and relinquishments of inheritances and legacies. Three typical cases concerning such transactions are stated below.

1. *A*, a residence [*sic*] of Texas, was legatee under the will of a decedent who died while domiciled in Texas. *A* renounced the bequest and the surrounding circumstances did not indicate that this act was a device or subterfuge to pass title or economic benefits to any particular person or persons.

2. *B*, a residence [*sic*] of North Carolina, was legatee under the will of a decedent who died while domiciled in North Carolina. Immediately on learning of the decedent's death, *B* renounced his legacy. Inquiry as to the persons who, as next to kin, might possibly benefit from such a renunciation disclosed that there were some persons who were heirs and natural objects of the bounty of both the decedent and the taxpayer, and they received benefits as the result of the renunciation; that there were other persons who were the heirs of decedent, but not of the taxpayer, and those persons also benefited by the

renunciation; and that there were other persons who were not the heirs of the decedent, but who were the heirs of the taxpayer, and who, because of the renunciation, lost potential interests in property.

3. *C*, a resident of New York, took out a life insurance policy payable to his wife, but retained the power to change the beneficiary during his lifetime. Subsequently, he and his wife were divorced, but he failed to exercise the power to change the beneficiary. *C* has since died and the wife remarried and refused to accept the proceeds of the policy. In order that the executor could collect the proceeds for the estate, the wife renounced her rights under the policy and released any claims which she might have against the insurance company.

Section 2501(a) of the Internal Revenue Code of 1954 imposes a tax "on the transfer of property by gift * * *." Section 2511(a) of the Code states that "the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible * * *."

Section 86.2(a) of Regulations 108, which is made applicable to the Internal Revenue Code of 1954 by Treasury Decision 6091, C.B. 1954-2, 47, states that the tax will be imposed "whether the transfer is in the trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible" and that "all transactions whereby property or property rights or interest are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax." Section 86.8 of the same regulations states that "transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts * * *."

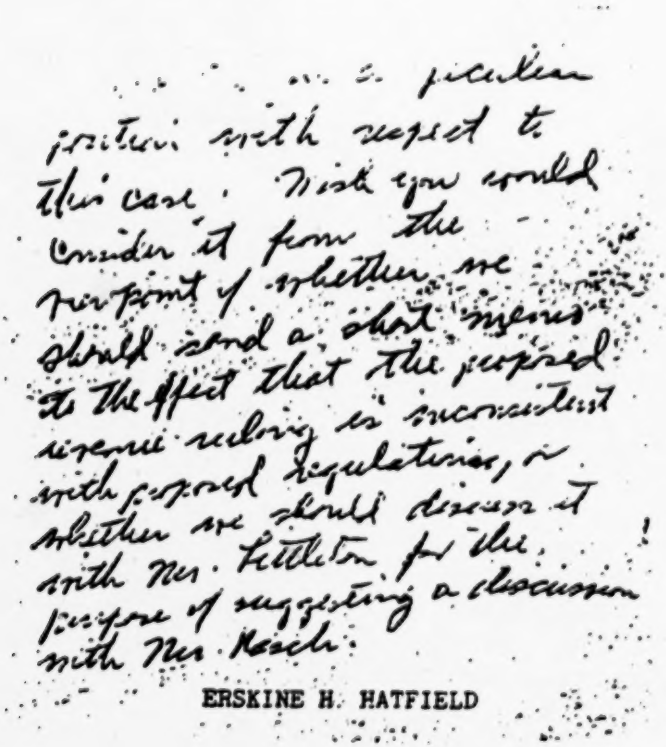
Whether or to what extent the transaction in each of the three cases stated above is subject to the tax imposed by section 2501(a) of the Code does not depend upon title to the property being held by the party at the time he executes the renuncia-

tion, release or relinquishment. As was stated in *Burnet* v. *Murray Guggenheim,* 288 U.S. 280, Ct. D. 636, C.B. XII-1, 374 (1933), "Taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." In that same case, the court also said, "Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title."

In view of the foregoing, it is held that a renunciation, release or relinquishment by a legatee or devisee under a will, or by a beneficiary under a policy of insurance, constitutes a transfer of property or property rights or interest subject to Federal gift tax under Chapter 12 of the Internal Revenue Code of 1954.

With respect to such transactions as are set forth in examples 1 and 2 above, it has been concluded that, under the authority contained in section 7805(b) of the Internal Revenue Code of 1954, the ruling set forth herein will not be applied retroactively with respect to such renunciation which became absolute and irrevocable prior to _____, the date of this Bulletin. The non-retroactive effect of this ruling will not apply to any purported renunciation as set out in transaction 3 above.

APPENDIX 8



... a peculiar
position with respect to
this case. Wish you would
consider it from the
viewpoint of whether we
should send a short memo
to the effect that the proposed
license ruling is inconsistent
with proposed legislation, or
whether we should discuss it
with Mrs. Fullerton for the
purpose of suggesting a discussion
with Mrs. Peach.

ERSKINE H. HATFIELD

APPENDIX 9

OFFICE MEMORANDUM

UNITED STATES GOVERNMENT

T:P:A
CM-952

TO: Director, Special Technical Services Division
Attention: Chief, Bulletin Branch

FROM: Director, Technical Planning Division

SUBJECT: Proposed Revenue Ruling Relating to Section 2501 of the 1954 Code

The proposed revenue ruling (Control File M-311) was scheduled for publication in advance of the regulations, and was referred to this division for consideration in connection with the established procedure for clearance with the Treasury Department.

In the past the Service has followed the decisions of the courts in the cases of *Brown v. Routzahn,* 63 F (2d) 914, and *Hardenbergh v. Commissioner,* 198 F (2d) 63, in determining whether the renunciation of a gift, bequest, or inheritance constitutes the making of a gift. Pursuant to *Brown v. Routzahn,* the Service has taken the position that if the decedent's death did not automatically vest title in the beneficiary, a timely renunciation of the bequest would not constitute the making of a gift. However, pursuant to the *Hardenbergh* case, the Service took the position that if title vested immediately, then the beneficiary by renouncing the bequest gave up something legally owned by him and thereby made a gift. The distinction between the cases is whether title *vested* in the beneficiary. The proposed revenue ruling would, among other things, abolish the distinction and hold that a renunciation

under the circumstances present in the *Brown v. Routzahn* case (where the renunciation became effective before legal title vested in the beneficiary) constitutes the making of a gift.

At the time the gift tax regulations under the 1954 Code were being developed, consideration was given to the inclusion in the regulations of the rules in *Brown v. Routzahn* and *Hardenbergh v. Commissioner.* The proposed published ruling was reviewed by this Division and by the Legal Advisory Staff in connection with the consideration given to this matter. All persons concerned believed that the distinction drawn by these court decisions was artificial, and that renunciations under both sets of circumstances should be treated in the same manner. However, several persons felt that a reversal at this time of the Service's prior position might result in legislation excluding from gift tax renunciations under both sets of circumstances, and, therefore, that the prior position of the Service with respect to cases coming within the *Brown v. Routzahn* decision should not be changed. Mr. Laurens Williams, at that time Assistant to the Secretary (and Head, Legal Advisory Staff) inclined tc this view. As a result language has been inserted in the proposed gift tax regulations adopting the rules in these two court decisions. The language in the proposed regulations (section 25.2511-1 (c)) on the subject reads as follows:

> " * * * The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does [not] immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest. * * * "

Inasmuch as portions thereof are not in accord with the language of the proposed gift tax regulations, the proposed

revenue ruling is returned for such disposition as you deem advisable.

_____

Director
Technical Planning Division

Attachment:
Bulletin Branch File

APPENDIX 10

T:P:A
CM-952

Director, Special Technical Services Division
Attention: Chief, Bulletin Branch

Director, Technical Planning Division

Proposed Revenue Ruling Relating to Section 2501
of the 1954 Code

The proposed revenue ruling (Control File M-311) was scheduled for publication in advance of the regulations, and was referred to this division for consideration in connection with the established procedure for clearance with the Treasury Department.

The language in the proposed regulations (section 25.2511-1 (c)) on the subject reads as follows:

> " * * * The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does not immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest. * * * "

Inasmuch as portions of the revenue ruling are not in accord with the language of the proposed gift tax regulations, it is

returned with the recommendation that publication be withheld pending promulgation of its final gift tax regulations.

(signed John D.S. Littleton)
EHH

Director
Technical Planning Division

Attachment:
Bulletin Branch File

WSGreen:arw-10-11-57

Initiator	Reviewer	Reviewer
P:A	TPA	T:P
Green	Hamblin	Littleton
		EHH
12/16/57	12/16/57	10/18/57

APPENDIX 11

Mr. Schmid's changes in the gift tax.

On page 22, paragraph (b) should the ninth line of this paragraph read "actuarial methods or actuarial method or other accepted valuation method."

On page 26, paragraph (1) the material in the parenthesis should indicate that the discretion lies with a trustee and the proviso portion of that paragraph should not be deleted.

On page 32, paragraph (c) the renunciation rule should not depend on testacy v. intestacy.

One page 33, paragraph (c) questions the partial disclaimer sentence.

On page 37, paragraph (1) in the first line after the word "property" insert the words "for less than an adequate and full consideration in money or money's worth."

On page 41, delete sentence inserted in margin.

On page 42, paragraph (b) in the third line from the bottom of the page strike the phrase "the gift is incomplete" and insert in its place "there is no transfer".

On page 43, paragraph (c) in line 5 after the word "beneficiarys" insert the word "other than himself", in line 6 place a period after the word "themselves" and strike the remainder of the existing sentence. Insert a new sentence reading "However, if the power is a fiduciary power limited by a fixed or ascertainable standard to name new beneficiarys, other than the donor, or to change the interests of the beneficiary as between themselves, the gift is completed.

On page 43, paragraph (d) valuation problem.

On page 44, paragraph (e) last sentence in the paragraph should not be deleted.

On page 44, paragraph (f) in the first sentence after the word "trust" insert the words "as trustee". In the second line eliminate the word "the" before the word "power" and substitute the word "a" after the word "power" strike the words "as trustee" and substitute therefor "without a fixed or ascertainable standard".

On page 45, paragraph (f) strike the period after the last word in the paragraph and add the phrase "and are not completed gifts".

On page 52, in the insert, insert the words "such as" before the word "is" in the fourth line from the bottom.

On page 54, second line strike "good will" and substitute "value".

On page 71, the sentence beginning "See, however, section 2515 . . . ." which was deleted from the regulations should be reinserted at the end of § 25.2512.

On page 76, paragraph (d)(2) after the word "gifts" the word "correctly" should be inserted. Paragraph (d)(4) after the word "gifts" the word "correctly" should be inserted.

In (d)(2) and (d)(4) of the same page the word "proper" should be stricken and substitute the word "spouse's".

On page 87, the last sentence in paragraph (2) should be put back in the regulations.

LAIRD BELL
BARRELL B. BOYD
THOMAS L. MARSHALL
WALTER T. FISHER
F. C. E. LUNDGREN
GLEN A. LLOYD
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Air Mail

Treasury Decision

December 7, 1956

RECEIVED IN
U-6310-L
DEC 10 19[illegible]
CHIEF COUNSEL'S OFFICE
FOR THE
INTERNAL REVENUE SERVICE

Mr. Paul Schmid
Office of the Chief Counsel
Room 5229
Internal Revenue Building
Washington 25 D.C.

Reg 7 Reg

Dear Paul:

I have finished going over the Gift Tax Regulations. Since some of my suggestions are really in the nature of questions, I thought it would expedite things if I sent you a memorandum of them, so that we can resolve them between us before I return a marked copy of the regulations to the Treasury. I am therefore enclosing several copies of such a memorandum. I suggest that if possible you telephone me after you have considered them.

I am also enclosing a draft of a proposed expediting memorandum.

I am sorry I have been a little longer about this than I had hoped to be.

Sincereiy yours,

James P. Johnson

JPJ jes
Air Mail
Enclosures

copy to: Mr. Raphael Sherfy

APPENDIX 12

U. S. TREASURY DEPARTMENT

Washington 25

Oct. 1, 1958

T:P:WE
R-346-1

MEMORANDUM FOR: Honorable Robert B. Anderson
Secretary of the Treasury

SUBJECT: Proposed Treasury decision—Regulations under provisions of the Internal Revenue Code of 1954 relating to the gift tax.

There is transmitted herewith, with the recommendation that it be approved, a proposed Treasury decision which would issue the Gift Tax Regulations (26 CFR Part 25) under chapter 12 of subtitle B of the Internal Revenue Code of 1954. The regulations contained in the proposed Treasury decision are applicable to gifts made on or after January 1, 1955.

The proposed Treasury decision is substantially the same as that published as notice of proposed rule making in the Federal Register of January 3, 1957 (22 F.R. 53). In those areas where the Estate Tax Regulations and the Gift Tax Regulations interpret similar provisions of law, the Gift Tax Regulations have been conformed to agree with the positions taken in the Estate Tax Regulations. Among the provisions of law pertaining to the estate tax and the gift tax which are similar are those relating to valuation of property, powers of appointment, charitable deductions, marital deductions, and certain administrative provisions relating to the time and place for filing returns and paying tax, the keeping of records, etc. In the case of the Estate Tax Regulations certain material found in the notice of proposed rule making was removed from the final

regulations because of doubt as to the accuracy of the material, and certain subjects were not treated (or, if treated at all, were referred to in general terms only) because of lack of agreement as to the precise rule to be followed. Where such material and subjects also come within the scope of the Gift Tax Regulations, the same action was taken as in the case of the Estate Tax Regulations. Among these subjects are transfers for less than full consideration (including property settlements and transfers for support which do not come under section 2516), and the valuation of shares in open-end investment companies. A few significant changes were made in the portions of the proposed regulations which pertain to subjects peculiar to the gift tax. These changes may be summarized as follows:

Disclaimers.

Paragraph (c) of section 25.2511-1, as set forth in the notice, discusses certain acts which constitute the making of a gift. Among the acts discussed is the renunciation, or attempted renunciation, of property, or a property interest, passing from a decedent. In what was intended to be the application of the rules in *Brown v. Routzahn* (1933) 63 F. 2d 914, cert. denied 290 U.S. 641, and *Hardenbergh v. Commissioner* (1952) 198 F. 2d 63, cert. denied 344 U.S. 836, it was stated that where title to the property did not vest in the beneficiary or heir immediately upon the decedent's death, the renunciation of the property did not constitute the making of a gift, but that where title vested in the beneficiary or heir immediately upon the decedent's death, the act of the beneficiary or heir in giving up what passed to him from the decedent constituted the making of a gift. Furthermore, in the notice the position was taken in paragraph (c) that a partial renunciation of property could not be made. Protests on these provisions were received. After reviewing these protests, we have reconsidered our position and now believe that the proper distinction between these two court cases turns on the question of whether under the applicable State law a beneficiary or heir can or cannot refuse to accept ownership of the property which passed from the decedent. Accordingly, we have revised paragraph (c) of sec-

tion 25.2511-1 to reflect this change of position. Also, we have abandoned the position that a partial renunciation cannot be made, and paragraph (c) has been further changed to recognize a partial renunciation where it is effective, as such, under local law.

Annual exclusions for gifts to minors.

In general, section 2503 (b) authorizes an annual exclusion of $3,000 for gifts of present as against future interests. Section 2503 (c) then provides (in part) that a gift of property to a person under 21 years of age will not be considered a gift of a future interest in property if the property "may be expended . . . for the benefit of" the donee before his attaining the age of 21 years. In the notice of proposed rule making, it was indicated by way of example that the above-quoted condition of the section might be satisfied even though the trustee or custodian of the property did not have the unrestricted discretion to determine the amount and purpose of any expenditure for the donee. This example has been modified in order to point out that the trustee or custodian must have unrestricted discretion in these respects.

Section 2503 (c) further provides that in the event the donee dies before attaining the age of 21 years, the property must be payable to his estate or "as he may appoint under a general power of appointment." The position is taken in the notice that the power of appointment must be validly exercisable by the donee under the applicable local law (taking into account the fact that the donee is under 21 years of age). It is our opinion that Congress did not intend that the condition of the section relating to the power of appointment be satisfied by setting up a power of appointment in the donee that could never be used. Certainly, a literal reading of the statute supports such position, i.e., if the power was not exercisable, the property would not "be payable . . . . as [the donee] may appoint." Furthermore, it is our understanding that the purpose of section 2503 is to allow the annual exclusion for gifts to minors when they substantially own the transferred property (because gifts to adults receive such treatment). The minors do not substantially

own the transferred property if, when they die under 21 years of age, the donor can control the disposition of the property (as he can if the minor is given a nonexercisable power, with gift over in default of appointment).

Only a few protests were received which objected to the position taken in the notice regarding the power of appointment. Such protests contain two main arguments. First, it is contended that the position taken in the notice is inconsistent with Rev. Rul. 55-518, C.B. 1955-2, 384, which would include in a decedent's gross estate under section 2041, the value of property over which the decedent "has at the time of his death a general power of appointment" even though such power is not exercisable because of the decedent's incompetency. It is our thought that the position in the notice is proper and that it can be reconciled with the ruling, since the language contained in section 2503 (c) is different from that contained in section 2041 (see above-quoted material). However, if it should be determined that the position taken in the notice is inconsistent with Rev. Rul. 55-518, reconsideration could be given at a later time to the position in the revenue ruling, taking into account other related problems in the field of estate taxation.

Secondly, it is contended that Congress knew that persons under the age of 21 cannot generally exercise powers of appointment and that the inclusion of the power of appointment provision was intended to cover cases where minors were given nonexercisable powers. This argument does not seem convincing to us, especially since in some States powers of appointment can be exercised by persons under 21 years of age (e.g., some States allow a person 18 years of age to exercise powers of appointment).

Commissioner

Attachment

WSGreen:jk:10-1-58

[At least one dozen sets of initials and dates are at the bottom of this page.]